

VI. GUARDIANSHIP OF THE ESTATE

A. *What is the Responsibility of a Guardian of the Estate?*

Guardianship has its origins in efforts by the government to look after an individual's land, money, and other property. Usually there were two reasons for appointing a guardian. The first was to make sure that the person would not mismanage or give away all of his property and wealth so that he or she would become dependent on the government for support (and unable to pay taxes). The second reason was to allow the person's relatives to protect the land and possessions. Since these relatives were likely to inherit whatever the person had when he/she died, the use of guardianship was often used by them to protect their own self interests as well as the interests of the supposedly incompetent person.

The emphasis on guardianship for the person's property (this includes land, real estate, *and* also personal property ranging from jewelry, furniture, cars, and stockholdings through clothing, books, pictures and cash) was carried over into Wisconsin. Most of the states, including Wisconsin, have laws which talk more about the duties of guardians of the estate to take care of a person's property than about the duties of guardians of the person. While there are a number of rules that have to be followed fairly carefully in managing the person's property, the basic guideline to remember is to **always be at least as careful with all the property of the ward as a reasonably careful person would be if it were his or her own property.**

You may be personally responsible if you fail to take reasonable care in managing the person's property or finances, and this results in some loss of property or a failure to get access to income or benefits to which the person was entitled. In some situations where a lot of property is involved, the judge may require you to post a bond to ensure that the ward will be able to recover from the bond or insurance company.

An example of the guardian's level of responsibility would be a situation where the disabled person has some personal belongings - for example, a television set, winter clothes, some mementos, books, and records - that need storage for a period of six months. The guardian should consider what a reasonable and careful person would do: find a place where they would not be likely to be stolen or damaged. If some of the things were really valuable the guardian may want to make sure that there was some kind of insurance. If some or all of the things in storage were accidentally damaged, the guardian would not be legally responsible as long as his or her choice of a place to store the property was found to be reasonable.

This same guideline would be used in dealing with the person's money. As a guardian, you are responsible for making sure that whatever money that he or she has is used wisely and only for the person's own benefit. The primary responsibility is to see to the ward's best interests, not to build up his or her estate. In other words, the ward should live at the standard of living he or she can reasonably afford, while still keeping a reasonable level of funds for future needs.

The guardian does **not** have the responsibility to support the ward out of the guardian's own money. However, the guardian does have the responsibility of making sure that applications are made for all local, state, and federal income support programs (such as Unemployment Compensation or disability benefits, Social Security, Supplemental Security Income, Food Stamps, Medicare and Medical Assistance, and other supportive programs such as the Community Options Program) that could assist in supporting the ward. If the ward does qualify for these programs, it is the guardian's duty to make sure that these benefits are used wisely and that the ward does not do things which would jeopardize eligibility.

Example: Paula has no income or health insurance, is unable to work in a substantial job because of her disability, but is able to live on her own if she has the necessary money and supportive social services. She would most likely qualify for the SSI program and also for subsidized medical services through the Medical Assistance Program. It is the guardian's job to make sure that Paula rents or shares an apartment that she can afford on her income while

having enough money left over for necessary food, clothes, personal items and transportation during the month, and that applications are made for needed benefits. If Paula ends up paying for some medical expenses because application for Medical Assistance was never made, a guardian might be held personally responsible for the costs.

There might occasionally be conflicts between the guardian and the ward in situations where the guardian feels that funds must be kept for basic food and shelter, and possible future needs, while the ward would rather have new clothes or more spending money. If the person really does not have extra funds, the guardian has a responsibility to ensure that the rent is paid and the person has enough to eat. On the other hand, there is an added feeling of self worth that often comes with wearing new clothes and having some money to spend as a person wishes. The person should not be kept in needless poverty while funds accumulate.

In some cases the person may have very little discretionary income because he or she is living in a nursing home or other residential setting and receives only a personal needs allowance. Even though the amount of money may seem like very little to the guardian, this does not mean that the guardian should be any less careful in how the money gets spent. The guardian must again place him or herself in the position of the ward and ask the question: "If I only had \$65 this month, what would I most want to spend it on?" The guardian should find a way to determine what the person needs or might like so that the funds can be used for his or her benefit. This might mean small expenditures each month, or it might mean saving the money for a big event or major purchase.

In all cases, the guardian of the estate is required to keep good records of how much money or property was received and how it was spent or disposed of. When first appointed, the guardian will have to prepare a list of all the ward's property along with an estimate of what each item is worth at the time the list is made (as opposed to what the item cost when it was bought). This list is called an **inventory**.

The guardian will also have to keep track of how much money was received (with the date it was received) and how it was spent. It would be a good idea to get a notebook to write all this in since there must be reports filed with the probate court each year. Ask for separate receipts when buying things for the ward and keep these receipts (write on the back of the receipt what it was for) so that it is easier to fill out the annual report.

One of the most commonly asked questions is: "Can a guardian pay him or herself out of the ward's money?" The answer depends on what the money is being paid for. Naturally the guardian is never authorized to spend the ward's money where the person is getting no real benefit. The guardian who wants to use the ward's money to buy a new coat or fishing pole for the guardian better look somewhere else for the money. A more difficult decision would be whether the guardian can charge the ward room and board or whether the guardian can charge the ward for the costs of driving the disabled person from place to place. If the guardian is the ward's representative payee under certain government benefits, he or she might want to talk with someone at the local Social Security office about this.

In general, the guidelines should be whether you would (or have) made other adult sons or daughters, friends, or relatives pay for these kinds of services or whether these services are out of the ordinary. For example, if the guardian takes the disabled person out for a Sunday drive along with the rest of the family, it would be unfair to charge the expenses to the ward. But if the guardian had to drive a number of miles out of the way each day to transport the ward to and from a therapist or a day program, then this is probably a fair charge. (A record detailing the mileage and the expenses should be kept.) But again, ask yourself whether you would have expected a non-disabled friend or relative to pay in similar circumstances and be prepared to justify your charges to the court.

A guardian can use the person's property to pay for reasonable expenses for keeping track of the ward's property (for example the cost of using an attorney to help fill out annual forms) and for managing the property-stockbroker, investor, or real estate manager.

The word fairness is what is really important here. Most questions can be answered if the guardian places him or herself

in the shoes of the ward and asks whether it would be fair to be charged for this or that. Since the guardian is also the protector of the ward, the guardian should be especially careful to avoid situations where the answer to this question is "iffy."

Perhaps more common situation for many guardians is the case where the ward's income does not seem to be enough to adequately take care of all the ward's needs. Even after the guardian applies and gets eligibility for all the possible programs for the ward, there still may not seem to be enough. At this point the guardian must again realize that just because he or she was appointed guardian does not mean that there is a legal responsibility for contributing to the ward's support.

While knowing that they have no legal duty to do so, some guardians decide to help out their ward on either a special or regular basis. When doing so it is important for the guardian to be clear as to whether the assistance is a gift or a loan. A gift is something that you do not expect to be paid back for. A loan is when you let someone else have the use of money or something else with the understanding that it will be returned to you at some point.

Because the guardian should always be careful to avoid all situations where it might look to others that he or she is trying to take advantage of the unsuspecting ward, loans with any interest charges should never be made between the guardian and the ward. This does not mean that a guardian cannot plan to pay him or herself back after lending the ward money to replace a lost or badly torn coat in the middle of winter. It just means that the guardian should avoid even the appearance of making any money off the deal.

Like a guardian of the person, a guardian of the estate should recognize that the person can only learn to manage his or her own affairs by participating in decisions, making choices on his or her own, and taking some risks. A guardian of the estate can and should involve the ward in managing some or all of his or her finances, by talking to him or her about decisions and by allowing him or her to make his or her own choices, e.g., by giving the person a weekly or monthly allowance for expenses, or by setting up a dual checking account that allows him or her to write checks with the guardian's approval.

A guardian may not make gifts of the ward's property except in very narrow circumstances. Generally, the guardian may not make gifts because it is the guardian's responsibility to "preserve and protect" the estate. Giving away the property does not "preserve or protect" the estate. This is true even where the ward had previously, when competent, made gifts of some of his or her property, such as checks to certain charities or family members.

The law does, however, permit a guardian to use the ward's funds to pay for the "suitable education, maintenance and support of the ward and of the ward's family" **but only for family members who are legally dependent upon the ward for support.** This means that a guardian can use some of the ward's money to pay for some household expenses of the ward's spouse or minor children, but not for an elderly ward's adult children.

A second exception is that a guardian of a *married* ward (whether the guardian is the ward's spouse or not) may file a petition with the court seeking permission to use some of the ward's funds to pay for items or expenses that will benefit the ward's spouse or members of the ward's immediate family. Note that this is only for married wards and only after first receiving court permission.

B. Legal Requirements of a Guardian of the Estate

The following listing provides the four categories of laws governing Guardians of the Estate: (1) What Guardians of the Estate must do with the ward's property; (2) what Guardians of the Estate may do with the ward's property without approval of the court; (3) what the Guardian of the Estate may do with the property of the ward only with specific approval of the court; and (4) what a Guardian of the Estate may not do.

1. What a Guardian of the Estate MUST DO

- File the inventory of assets within six months of appointment. The inventory must be verified by the court.
- Possess the ward's property and exercise rights over it. (Title, however, remains with the ward.)
- Protect and preserve the ward's property.
- Carry out his or her **fiduciary** responsibility to exercise good business judgment and common sense. In handling the ward's assets, the guardian must use the same degree of judgment and care that persons of ordinary prudence, discretion and intelligence would use in handling their own assets under similar circumstances. Because of the duty to protect and preserve the property, a guardian may not make gifts of the ward's property, even where the ward previously had a history of doing so. Similarly, the guardian may not spend assets on items that are not solely for the benefit of the ward. For example, where the guardian and ward lived together in the guardian's home, and the guardian's roof needed repairs, the guardian may not use the ward's assets to repair the roof. (A guardian could, however, with the court's permission, charge the ward a **reasonable** rent for living there.)
- File annual accounts each year by April 15 for the preceding year. (This does not apply to corporate guardians.) The guardian must account for all funds received and spent, and is at risk of being removed by the court for failing to file these accounts.

2. What a Guardian of the Estate *MAY DO WITHOUT APPROVAL OF THE COURT*

- Demand, sue for, collect and receive all debts and claims for damages due the ward.
- Retain the ward's personal or real property possessed by the ward at time of appointment or later received by the ward by gift or inheritance without regard to Chapter 881 of Wisconsin Statutes (Trust Fund Investments), and use judgment and care as a person with prudence, discretion and intelligence, without speculating.
- Sell, invest and reinvest the proceeds of the sale of any trust fund investments according to the law in Chapter 881 of Wisconsin Statutes.
- Settle all the accounts of the ward.
- Use the personal property or income of the ward for the suitable education, maintenance, and support of the ward and family members. (NOTE: This includes spouse and dependent family members only.)
- Use the personal property or income for the care and protection of real estate (or real property) owned by the ward.
- Collect the ward's income, such as Social Security, pension, dividends and interest.
- Pay the ward's bills and contest or compromise claims.
- Take care of the ward's home or other real estate and put things in storage.
- Hire professionals (for example, attorney, CPA, appraiser, etc.)
- Sign the ward's tax returns.
- Petition for placement of the ward's assets into his or her revocable living trust.
- Apply for public benefits, e.g., SSI or Medical Assistance. NOTE: In anticipation of such application, the guardian

may purchase irrevocable burial trust, paid-up life insurance and other exempt assets for the ward. There is, however, no authority for the guardian to divest the ward's assets.

3. What a Guardian of the Estate *MAY DO ONLY WITH SPECIFIC PRIOR APPROVAL OF THE COURT*

- Continue the business of the ward. The court must decide that continuing the business is advantageous to the ward and then set terms and conditions of how the business would be continued.
- Invest proceeds of the sale of any property or funds subject to the guardianship in other real or personal property. Any such investment must be determined by the court to be "in the best interests of the ward."
- Keep any real or personal property of the ward possessed by the ward at the time of appointment or received by gift or inheritance **when prudent business practice would suggest that the property be sold and the proceeds invested.** (EXAMPLE: A guardian should ask for court approval to hold on to an antique family heirloom to avoid a claim of mismanagement of the estate.)
- Sell, mortgage, lease, or exchange any property of the estate, and then only for:
 - Paying the just debts of the ward; OR
 - Providing for the care, maintenance and education of the ward or the ward's dependents; OR
 - Investing the proceeds; OR
 - Any other purpose the court determines to be in the ward's best interests. **NOTE: Very specific, detailed procedures must be followed and the advice of a lawyer is recommended.**

4. What a Guardian of the Estate *MAY NOT DO*

- Loan any of the guardianship funds to him or herself.
- Use any of the guardianship funds or property for his or her personal needs.
- Give away or donate any of the ward's funds or property, even where there has been a pattern of such gifts, or to assist the ward in qualifying for Medical Assistance.
- Purchase any of the property of the ward unless:
 - the sale is a public sale, such as an auction; AND
 - the court specifically authorized the sale; AND
 - the guardian making the purchase is a spouse, parent, child, brother, or sister of the ward, or is a co-tenant with the ward in the property.

NOTE: A Guardian of the Estate has no authority over personal and health care-related decisions for the ward, such as consenting to health care or deciding where the person should live. Generally, a guardian of the estate should not use his or her power over the person's funds to control personal decisions. For example, a guardian of the estate can refuse to sign the lease for an apartment that the person cannot afford. On the other hand, the guardian of the estate should not refuse to sign a lease as a way of controlling where the person chooses to live, or refuse to release personal needs funds

as a way to force the person to accept treatment.

VII. PRESERVING AND PROTECTING THE PERSON'S RIGHTS

A. *Introduction*

A goal of Wisconsin's protective service and guardianship statutes is to allow the person, as much as possible, the same rights as other people have. In addition, people in service settings, such as mental health treatment or nursing homes, have special rights in relation to service providers. It is important for a guardian to understand the person's rights and to look at them from at least three points of view:

- What rights are the person still able to exercise safely and effectively for him or herself? There is no reason for a guardian to take over these rights, and they should be reserved for the person through a limited guardianship. (See Section III) Are there other areas where a guardian is needed to prevent harm or protect a right, but the person can be involved in the decision, to give him or her as much autonomy as possible, and to help him or her learn to exercise the right?
- What rights create limits on the guardians powers to direct the person's life?
- What rights is the guardian responsible for protecting and promoting as part of the duties of a guardian?

B. *Constitutional Rights*

1. Balancing Constitutional Rights with the Guardian's Responsibility to Protect the Person's Best Interests

A person who is under guardianship does not lose his or her constitutional rights. Constitutional rights protect individuals in our society from undue interference by the government. Among these protected rights are: the right to life; the right to personal liberty; the right to freedom of speech and religion; the right to associate with persons of one's own choosing; the right to due process of law; the right not to be subjected to cruel and unusual punishment; and the right to have access to the government and the courts.

Because a guardian gets his or her powers from state statutes and the order of the court, he or she is considered to be acting for the state when making decisions that limit the person's constitutional rights. Put another way, the guardian has no more power to interfere with these rights than the state has under the constitution.

The ordinary rule is that the state must show **a compelling need for interfering with constitutional rights**. This same test can be useful for guardians: if a guardian's exercise of his or her powers will interfere with the person's constitutional rights, is there some compelling reason, such as physical safety or protection from abuse and neglect, that justify the interference? For example, a guardian probably has the authority to prevent the ward from having contact with someone where there is good reason to believe that the other person would physically abuse or financially exploit the person. On the other hand, it is probably an abuse of the guardian's powers to prevent the ward from seeing certain friends because the guardian does not like them or because it is inconvenient.

The guardian's power probably varies with the ability of the person to make his or her own decisions and express his or her preferences. The more clearly the person is able to state a preference in a protected area, the more this preference should be respected. For example, a guardian may be able to take a person to the church of the guardian's choice if the person agrees or states no opinion. On the other hand, a guardian should not use his or her powers to pressure a person to attend a particular church if the person protests because he or she clearly prefers a different religion or no religion at all.

Because mutual respect and a cooperative relationship are more likely to help the person learn responsibility than overuse of power, the guardian should carefully weigh the person's abilities and preferences and the level of danger to the person's interests before using his or her legal authority to control the person's life. Where a guardian is considering acting to restrict the person's basic rights as a citizen, the guardian should consider several factors:

- What level of risk is typical in our society in order for people to have typical life experiences? Is the person losing out on having a normal life when he or she is not in significantly more risk than the rest of us? We all make mistakes - and hopefully learn from them. People under guardianship should have this same "dignity of risk," if it can be done without exposing them to a substantial risk of serious harm.
- Are there ways to protect the person other than completely taking a right away? For example, if there are concerns about a particular visitor, can visits be monitored rather than prohibited?
- Can the person learn to exercise the right by being given controlled opportunities to make his or her own decisions?

As stated earlier, the guardian's role in having custody over the person is to care for the needs and rights which the person is incapable of taking care of on his/her own. Taking power over areas where the person does not need help can be as harmful as not providing support where it is needed.

2. The Right to Life

A person's right to live is in no way lessened because of a mental or physical disability or because they are a ward under a guardianship. To some people, this last sentence may seem too obvious to need to be said, but historical review of society's treatment of disabled people indicates numerous instances where a decision was made to not provide disabled people with available medical treatment and, therefore, that person was allowed to suffer, deteriorate, or die. The guardian has a duty to make sure that the ward's medical needs are provided for just as they would be for people without disabilities. (See Section V-E-6)

3. The Right to Freedom of Movement and Choice of Residence

Responsibility for the person's care and custody carries with it responsibility to ensure that the person does not place him or herself in unsafe situations, for example by going out in traffic if the person does not understand the risk, or going out in bad weather without adequate clothing. On the other hand, the law is not at all clear as to the level of physical force that a guardian is authorized to use. For example, the courts have held that a guardian may not authorize physical force to make the person accept psychotropic medication. This may also apply to use of force to make the person go to a treatment or other service setting. In practice, without clearer guidance from the law, guardians must try to use common sense. If there is a consistent use of physical force needed, or if the person is confined through use of restraints or locked doors, there will usually be a need for some kind of court order for protective services or commitment.

As discussed in Section V-F, the guardian does not have the authority to require the person to live in a residential placement against the ward's will, or to place the person for long-term nursing home or institutional care.

If the person is capable of choosing his or her own residence, with or without advice from others, it may be useful to specifically reserve this right through limited guardianship, so that it is clear that this is not a responsibility of the guardian.

4. The Right to Freedom of Speech and Religion

In applying the Constitution, courts have been very strict about protecting the right of all individuals to express themselves and choose their own religion - or choose not to practice any religion. It is difficult to imagine a situation where the court would, because of a person's mental disability, authorize anyone to restrict the person's right to express

themselves.

Courts have agreed that some individuals will have a more difficult time reaching their audience because their right to liberty has been restricted after following due process. Yet, even in situations where a person is involuntarily confined to a residential facility, the courts have been careful to make sure that the rights of such persons to receive visitors and mail and to write letters or telephone others is respected. For example, it may be acceptable to limit the number or timing of telephone calls, so long as the person's basic right to communicate with others is not denied. The law is particularly protective of the right to communicate with the courts, government officials, and attorneys. See Sections VII-F and G for rights of individuals in Wisconsin residential and treatment settings.

5. The Right to Associate with People of the Person's Own Choosing

There are at least two parts to the right to associate with other people: 1) the right to have friends and to develop relationships with people who are meaningful to you; and 2) the right to elect not to associate with persons who you do not like or who would likely harm you or take advantage of you.

A mentally disabled person might have communication or other problems which will make it more difficult to establish and maintain friendships. While the guardian does not have an obligation to make sure that the person has friends, it is certainly within the scope of the guardian's role to assist the person in developing friends, to put the person in situations where friendships can occur naturally, such as work or recreational activities, or even to encourage the ward to spend time with certain people.

Choice of friends and associates is a frequent cause of friction between guardians and wards. Sometimes, the person will be in real danger from a person who abuses the person physically or sexually, or uses pressure or fraud to take money or property the person requires to live on. However, in other cases the guardian may be expressing his or her own likes or dislikes, or trying to eliminate even normal risks because then the guardian will not have to worry about those risks.

If the person is able to choose his or her own friends, perhaps with some advice from others, it may help to avoid conflict to reserve this right through a limited guardianship. By not taking on this power to begin with, the guardian can avoid feeling responsible for risks the person may encounter.

6. The Right to Privacy; Reproductive and Sexual Rights

Constitutional rights to liberty and privacy have been held to include rights to control one's own body, such as the right to control reproduction and the right to private sexual activity between consenting adults. The role of guardians in issues of medical and other treatment, birth control, sterilization and abortion is discussed in Section V-E-7.

The issue of whether the person can consent to sexual contact is very important. **Sexual contact with a person who is unable to consent is a criminal sexual assault**, and the guardian clearly has a right and duty to prevent such sexual contact from occurring. A person is incapable of consent under the law if he or she has a mental disability that makes him or her incapable of appraising his or her conduct. If the person is not able to consent, the guardian does not have the authority to give consent to sexual contact on the person's behalf.

While Wisconsin law does not set out a clear test, tests which courts have applied to determine ability to appraise conduct include:

- Does the person understand that certain behavior is sexual?
- Does the person understand that he or she has a right to say no to unwanted sexual contact?

- Is the person aware of the consequences of sexual contact?

The fact that a person is under guardianship does not answer the question of whether he or she can consent to sexual contact. The standard for guardianship (incapable of care for self due to mental incapacity) is different from the legal test for consent to sexual contact, and in practice there are many people under guardianship experiencing consensual, and positive, sexual relationships. Ideally, the right to consent for people able to do so should be preserved when the guardianship is established through a limited guardianship. Where this is not done, inappropriate restriction of rights and ongoing conflict are likely to result. Where the guardian has doubts or concerns about the person's ability to consent, the guardian should explore the availability of counseling for the person in the areas of socialization, personal relationships, and responsibilities in dating and family planning.

There are real risks of sexual abuse, unwanted pregnancy and sexually transmitted diseases. While the "easy solution" to many of the fears that rise out of friendships that may become sexual may be to totally prevent potential partners from ever being together, or from ever having privacy, this "easy solution" sacrifices the rights of the mentally disabled person to normal friendships and to sexual expression for the peace of mind of others. The best approach will depend on the differing needs and abilities of each individual but should be as close to the normal range of opportunities in our society as possible. A guardian should never assume that the person's need for sexual expression is different or less important than that of other people. It is also important to remember that people have a range of ways of expressing their sexuality; sexual expression does not always have to mean sexual contact.

7. The Right to Due Process of Law

"Due process of law" is a phrase referring to the various rights which a person has when faced with the loss of life, liberty, or property. What those rights actually are depends on the particular situation. Courts have general rules that the more liberty or property that is being threatened to be taken away, the more due process rights the person should have. Among the different due process rights are: 1) the right to be notified that someone is planning to restrict your liberty or take away your property; 2) the right to challenge the intended actions of others; 3) the right to a hearing; 4) the right to be present at all hearings; 5) the right to ask questions of those witnesses who oppose your request; 6) the right to present your own evidence including your own testimony and the testimony of witnesses who support you; 7) the right to have another person assist you in presenting your case; 8) the right to a prompt decision - usually in writing; and 9) the right to appeal the decision. These due process rights of persons are not lessened simply because a person is declared mentally incompetent. Instead, it is the guardian's responsibility to take the steps necessary to see that these rights are enforced on the disabled person's behalf. For example, if a disabled person is being cut off from Medical Assistance or other benefits, that person still has a right to be notified and to challenge the actions of others. It is just that the guardian instead of the ward receives the notice and signs the papers necessary to appeal that decision.

8. The Right to Have Access to Government and the Courts

Even though a person is under guardianship, he or she retains the right to communicate with government officials about his or her treatment and to seek legal advice or court review concerning the need for guardianship, the guardian's actions, or any orders for protective placement or services. For most other types of legal actions, the guardian must begin the lawsuit on the ward's behalf instead of the ward beginning the suit on his or her own.

9. The Right to Vote

Under Wisconsin law, a person who asks to vote may not be denied the right to do so on the grounds of mental incompetence unless the person is under full guardianship of the person or a court has separately found that the person cannot understand the purpose of the elective process. Unless the judge limits a guardianship of the person to allow the person to keep his or her right to vote, the person's vote is lost rather than passed on to the guardian. (The guardian

does not get an extra vote.) In general, people should be allowed the dignity of participating in the process if they understand the purpose of voting, or if they can come to understand it with some training.

C. Other Civil Rights

1. The Right to Marry

Marriage is different things to different people, but, in addition to love and the capacity to be responsible, the law views marriage as a contract where two people each promise to do certain things in return for the other person also promising to do certain things. The right to marry can be taken away if the judge finds that, because of the person's mental incompetency, the person cannot understand what marriage is about or what he or she is agreeing to do. If the right to marry is taken away at the guardianship hearing, it is **not** transferred to the guardian. This means that the guardian cannot agree to marriage on behalf of the ward. If the guardian at some point believes that the ward is capable of marriage, the guardian should notify the probate court and ask that this right be restored. If the person wants to marry but lacks the ability to consent, training and counseling may help the person to gain the needed understanding.

2. The Right to Obtain Driver's Licenses and Other Licenses

The guardianship laws specifically allow the court to allow the person the right to obtain licenses. This implies that full guardianship of the person will deprive the person of the right to hold licenses. A court is often not the best place to determine whether a person should or should not hold a state license. Retaining the person's right to obtain a license does not automatically mean that he or she will get one: the person still must meet licensing qualifications of the agency issuing the license. There are probably some people who obviously are not competent to hold a driver's license or certain occupational or professional licenses. For many other people, however, it makes more sense to leave the question to the driver's or other licensing process that is designed to determine individual competence to hold a license. The guardian should take steps to notify the motor vehicle division or other appropriate agency if the ward, who already holds a license at the time of the guardianship hearing, is later found incompetent and the court has not found that he or she may still hold a license.

3. The Right to Testify in Any Judicial or Administrative Proceeding

Being under guardianship does not restrict the person from being a witness, and the person should be allowed to testify if he or she can communicate relevant evidence. It is then up to the judge or jury to decide how far to rely on the person's testimony.

D. Property Rights

1. The Right to Hold or Convey Property

If the judge decides that the person is mentally incompetent to hold or convey property, this does not mean the ward cannot own property but rather that the guardian of the estate rather than the ward has the responsibility for managing the property and deciding when to buy or sell property on behalf of the ward. This is done so the person does not let the property go unrepaired or the rents uncollected and so that the person does not buy or sell at unfairly high or low prices. The guardian of the estate manages the property, but title to the property remains in the ward's name and all of the income from the property is for the benefit of the ward. If the guardian decides that the best interests of the ward would be served by selling the property, the guardian must first get court approval of the sale and then use all of the income received from the sale only for the benefit of the ward. The annual report of the guardian of the estate to the court is one of the ways that this is monitored.

2. The Right to Contract

While many of us think of contracts as pieces of paper that are signed when having major remodeling done or a car bought or a loan taken out, contracts that are agreed to orally are much more common. Whenever one person agrees to give up something (usually money but it can also be other belongings, property or time) and another person agrees to provide something (goods, services, property, etc.) in return, that is a contract. Generally, we do not realize how many contracts we agree to until something goes wrong or someone does not do what they are supposed to do. Most of the time the amount of money involved is not enough to make it worth the time and effort to have a written contract, but that does not mean something that two people agree to orally is not a contract. The law allows people to contract with others and recognizes that sometimes one side or the other will be taken advantage of because the other side either has more information or drives a harder bargain. Although the law generally does not get involved with this unfairness, it does get involved when it finds, in a guardianship hearing, that one person's mental incompetence puts him or her at a constant unfair disadvantage and that he or she should be protected from possible exploitation.

Taking away the person's right to contract has three parts. The first part is that the ward can no longer have the right to insist that the other person or company contract with him or her. This means that although a hotel, store, bank or other company normally is prohibited from discriminating against a person because of a disability, they can refuse to rent a room, sell goods, or give a loan if they know that the person is unable to pay (does not have the money) or does not have the authority to control their funds so that they cannot pay for it. By restricting a person's right to contract, a judge is ordering that a person is not authorized to enter into agreements and, therefore, has no "right" to insist that others contract with him or her.

The second part of taking away the person's right to contract means that even if another person or company does contract with the ward, the contract is presumed to be invalid because the ward does not have the ability to understand what he or she was agreeing to. That means that if a person whose right to contract has been removed signs a contract and the other person or company wants to make the incompetent person keep his or her end of the deal, that other person or company will have to first prove that the person was mentally competent even though a court has previously found that the person was not mentally competent.

The right to contract is not totally removed, but is instead transferred to the guardian to act on behalf of the ward. This means that the ward's money can still be used but the guardian signs contracts on behalf of the ward instead of the ward. For example, imagine a situation where the ward who has had his right to contract restricted, wished to rent an apartment. The landlord may refuse to rent the apartment or to allow the person to sign a lease because he knows the mentally incompetent person has no authority to sign the lease. If the landlord, however, is not aware that the right to contract has been limited by the court, the landlord may decide to rent the apartment and allow the person to sign a lease. If the guardian later finds out that the apartment has been rented or a lease has been signed, the guardian has the responsibility of notifying the landlord as soon as possible of the fact that the ward's right to contract has been limited. If the guardian decides to get the ward out of the rental agreement or lease and notifies the landlord of this, the landlord must give back the unused money and tear up the lease. The guardian may, however, decide that the apartment is okay and the rent is the right amount. In that case, a new contract or lease should be made up with the guardian signing on behalf of the ward. Whenever the guardian signs something on behalf of the ward, the guardian should either sign his or her own name "Gary Guardian, guardian for Wanda Ward," or sign it as "Wanda Ward, by her guardian, Gary Guardian." This will help to make it clear that the guardian is signing something on his or her ward's behalf rather than for the guardian's own personal use. The guardian should also make it clear - in writing - that only the ward's estate will be liable for the contract.

E. General Human Rights - Respect and Dignity

When we use the word "rights" we do not just mean constitutional rights or rights found in laws. We also mean the general human rights which are not found written in books but are, in reality, the respect which we treat each other with

each day. When an employer or supervisor unnecessarily yells and humiliates an employee in front of a lot of other people and someone says “he has not right to yell that way” we are not talking about a law that makes it a crime to yell, but rather we are talking about the expectation of being treated with dignity and respect.

It will not come as a surprise to many guardians that people with mental disabilities are frequently denied their human “right” to be treated with respect and dignity. It will most likely be an ongoing task of the guardian to monitor the way the ward is treated by others and to intervene on behalf of the ward when the guardian observes the ward being treated in a dehumanizing way. This does not mean that the guardian is expected to be overprotective or start up a crusade each time the ward experiences one of the disappointments of life which each of us are exposed to. It does mean, however, that the guardian should attempt to be aware of patterns of behavior by others which indicate the need for some type of informal discussions or informal or formal education to correct that behavior.

F. Rights in Nursing Homes and Residential Facilities

People who live in nursing homes, intermediate care facilities, and community-based residential facilities are protected by a statutory bill of rights. These rights are found in the Wisconsin Statutes at Section 50.09(1). In addition, there are rules that give further detail on these rights in the following chapters of the Wisconsin Administrative Code: HFS 132 (nursing homes); HFS 134 (facilities for the developmentally disabled); and HFS 83 (community-based residential facilities). Copies of the statutes and rules are available in most public libraries. Protected rights include rights to:

1. Have private and unrestricted communications; mail, telephone, and personal visits;
2. Present grievances to operators and public officials;
3. Manage personal finances and/or delegate this responsibility;
4. Be notified of per diem rates, other charges and services;
5. Courtesy, respect and dignified treatment by all staff;
6. Physical and emotional privacy in treatment and living arrangements including privacy in visits and in medical examinations, discussions and records;
7. Not be required to perform non-therapeutic work for the facility;
8. Choice of participation in social, religious and community activities - unless medically contraindicated;
9. Retain and use personal clothing and property (within space limits);
10. Be transferred or discharged, and to be given advanced notice of planned transfer, discharge or alternatives. If discharge is involuntary, it must be based on failure to pay or inability of the facility to meet the person's needs, and it is subject to an appeal process;
11. Be free from mental or physical abuse and unauthorized physical or chemical restraints;
12. Receive adequate and appropriate care within the capacity of the facility;
13. Choose the provider of health care or pharmacist;
14. Be fully informed of and participate in planning treatment and care.

A complete copy of the rights and the facility's grievance procedure should be provided to the person and the guardian at the time of admission. If a person is under full guardianship of the person, the power to protect these rights passes to the guardian. The guardian should read these carefully, since he/she is responsible for exercising and advocating for those rights on behalf of his/her ward.

If a guardian believes the person's rights are being violated, he or she can use the facility's grievance procedure, or he or she can complain to the Board on Aging and Long Term Care, a state agency which investigates and mediates complaints, or to the regional office of the Bureau of Quality Assurance at the Department of Health and Family Services, which is the agency responsible for enforcing state and federal rules in nursing homes. See Appendix for addresses and telephone numbers.

G. Bill of Rights for People Receiving Institutional or Community Services for Mental Illness, Developmental Disabilities, Alcoholism or Drug Abuse

When a person receives alcoholism, drug abuse, mental health, or developmental disabilities services in the person's home community or from a private or state facility, whether inpatient or outpatient, he or she has certain rights under Wisconsin Statutes (section 51.61) and Wisconsin Administrative Code (chapter HFS 94). These rights also apply to any person who is protectively placed, including people with infirmities of aging. Covered settings include community services under contract with county community program departments, such as residential service providers and vocational agencies, and to other providers, such as outpatient clinics. One exclusion is that it does not apply to hospital emergency rooms.

Because these rights are specific to treatment for mental disabilities and are available in a wide range of settings, it is important for the guardian to try to become familiar with them. If the person is placed under full guardianship of the person, the guardian has the power and responsibility to exercise the rights on the person's behalf, except where consent of the person is specifically required.

Rights under sec. 51.61 are now enforceable through a grievance procedure which each provider and county is required to adopt. A grievance should first be investigated by the agency you are complaining against, and you have a right to a prompt and written response. Grievances can be appealed for review by the county and then by the state, so that there is a review independent of the agency. You can also bring a lawsuit on the person's behalf to stop violations of rights and to recover actual and exemplary damages for any harm from rights violations. If you are successful, the agency involved may also be required to pay your attorney fees.

Rights protected by sec. 51.61 include the following:

1. Treatment rights. The person has the right...

- To adequate and appropriate treatment, rehabilitation and educational services. This should include the right to learn basic living skills, as well as more formal treatment. This right may now be limited in county-funded services due to funding considerations. (See Section V-H-4)
- To have the least restrictive treatment condition needed to carry out the purpose of his or her commitment or admission. (See Section V-C) This right also may not be limited in county-funded services due to funding considerations. (See Section V-H-4)
- To be informed about treatment and care and participate in planning treatment and care.
- To live in a pleasant physical place, and to have people treat him or her with respect.

- To be free of excessive or inappropriate medication and to refuse to take any psychoactive medications or participate in treatment, except under certain circumstances. (See Section V-E-5)
- To refuse psychosurgery or other drastic treatment. (See Section V-E-5)
- To refuse to take part in experimental research. (See Section V-E-4)
- To be free from physical restraint and isolation, except as part of treatment or in an emergency. Restraint and isolation should never be used for convenience of staff or as a substitute for active programming.
- To have his or her conversations with staff, and all medical and care records kept confidential, and to have access to treatment records. (Confidentiality and access to treatment records are covered by sec. 51.30 of the Statutes.)

2. **Personal Rights.** The person has the right...

- To choose and wear his or her own clothes and personal articles.
- To have his or her own private storage space.
- To have privacy in dressing, toileting, and bathing.
- To send and receive sealed mail (within certain security precautions).
- To make reasonable use of the telephone.
- To see visitors each day.

[NOTE: The above six rights may be restricted because of the person's treatment or security needs. The person is entitled to notice and an informal hearing, and may complain about restrictions through the grievance procedure.]

- To refuse to be filmed or taped.
- To take part in religious worship.
- To use his or her money as he or she chooses.

3. **Grievances and legal remedies.** The person has the right...

- To present grievances and to communicate with public officials without justifiable fear of reprisal.
- To petition a court for review of any civil commitment order or protective placement.
- To bring an action for damages [§§51.61(7)] against persons violating his or her rights or confidentiality.
- To be considered legally competent unless a judge has found him or her to be incompetent.
- To be told about his or her rights, informed of any legal reasons there may be for denying any of those rights,

and be entitled to a hearing before certain rights are taken away.

4. **Other Rights.** The persons has the right...

- To be treated with respect and recognition of dignity by employees and other professionals and service providers.
- To be informed about how much he or she may have to pay for the cost of care and treatment.
- To receive wages for work, except in matters of personal care (e.g., making the bed, keeping his or her area, room and clothes in order), and to refuse to work for the benefit of the facility whether or not he or she is paid.
- To remain silent during any probable cause precommitment interview with a clinical psychologist or psychiatrist (because such interviews are not confidential).